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Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER, *Petitioner*,

v.

LEE BOLLINGER, *et al.*, *Respondents*.

JENNIFER GRATZ and PATRICK HAMACHER, *Petitioners*,

v.

LEE BOLLINGER, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

RENEE L. GIACHINO*
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street, Suite 402
Alexandria, VA 22314
(703) 535-5836

* Counsel of Record

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free expression rights, property rights, equal protection rights, due process rights, privacy rights, and the freedoms of association and religion. Of particular importance to the Center in this case is the constitutional guarantee of equal protection that affords an individual the right to compete for admission to state institutions of higher education on equal footing irrespective of race or ethnicity.

SUMMARY OF ARGUMENT

Dr. Martin Luther King, Jr., famously dreamed that his children would one day live in a nation where they would "not be judged by the color of their skin but by the content of their character." Apparently unmoved by Dr. King's words, the University of Michigan turns that dream on its head by judging its students precisely by the color of their skins and, in doing so, defiles the broader constitutional dream of equal protection of the laws.

The excuse the University gives for judging prospective students by the color of their skin is that it increases "diversity" and thus furthers the educational mission. Whatever the educational merits of a more diverse student body, that interest is simply not *compelling* in a constitutional sense. And where such "diversity" is defined by using race as a proxy for educational worth, nature of opinions, varied life experience, or the content of students' character, it not only fails to raise a compelling interest, it is affirmatively anathema to the Constitution and should be deemed *per se* invalid. Such judgments-by-proxy constitute odious stereotyping based on irrelevant racial criteria that this Court has condemned.

It is thus no surprise that this Court has never recognized racial diversity as a compelling interest justifying racial discrimination. And this Court never should recognize such

an interest. There are ample legitimate criteria for generating diverse student bodies that do not depend on invidious assumptions about the greater or lesser worth of students based on their race. Socio-economic differences are not suspect criteria and are likely to provide a considerable diversity of background, experience, and ideas. Likewise for geographic differences. To the extent that such diversity brings with it ethnic and racial diversity as well, it will have been accomplished through targeting genuine and relevant differences rather than through the targeting of race itself.

Wholly aside from the noxious character of the University's vision of "diversity," the program it has adopted is not narrowly tailored to achieve that interest with the minimum imposition on constitutional values. The nature and size of the racial admissions preferences effectively establish a two-tiered admissions system and a racial quota. Indeed, the admitted desire for a "critical mass" of supposedly under-represented minority students is an open admission of the existence of a quota. Not surprisingly, the University will precisely define neither the magnitude of the "critical mass" (*i.e.*, the minimum quota) nor the percentages of proper "representation" used to determine whether a particular minority group is *under*-represented. The University is thus on the horns of an intractable dilemma: Either it has a hard quota seeking supposedly "correct" representation of minorities—thus elevating race above all else—or it lacks any definable conception of proper representation, a "critical mass," and thus "diversity" itself, making it literally impossible to narrowly tailor its program to an undefinable interest. If the goal of "diversity" and representation is but an amorphous judgment call, then no court could ever apply strict scrutiny or know when the University had crossed the line from narrowly serving its interest to *over* serving that interest at the expense of the highest constitutional values.

ARGUMENT

This Court has long emphasized that racial and ethnic distinctions "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Consequently, "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed . . . under strict scrutiny . . . [and] are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, 515 U.S. at 227.

Despite the fact that racial classifications are almost always constitutionally prohibited, the University of Michigan seeks the approval of this Court in employing racial and ethnic distinctions to admit students to its undergraduate and law schools. However, just as this Court did a quarter century ago in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the affirmative action admissions programs utilized by the University must be struck down as both unlawful and unconstitutional under Title VI of the Civil Rights Act of 1964[2] and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[3] Quite simply, the University's race- and ethnic-based admissions programs serve no compelling interest nor are they narrowly tailored, thus they

[2] Title VI of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000d, which prohibits racial discrimination in programs receiving federal funds, "'proscribes only those racial classifications that would violate the Equal Protection Clause.'" *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

[3] The Equal Protection Clause of the Fourteenth Amendment commands: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

cannot pass muster under this Court's "strictest judicial scrutiny." *Adarand Constructors, Inc.*, 515 U.S. at 224.

I. THE RACIAL AND ETHNIC DIVERSITY SOUGHT THROUGH THE UNIVERSITY OF MICHIGAN'S ADMISSIONS PROGRAMS IS NOT A COMPELLING INTEREST

As detailed by the Petitioner and the court below, under the Law School's admissions program, "[t]he figures indicate that race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost on the LSAT." *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting).[4] The situation is almost exactly the same with regard to undergraduate admissions. An applicant's score, ranked on a 150-point scale, is calculated by aggregating the numerical values assigned to each of a variety of factors, including high school grade point average, standardized test score, quality of school, strength of curriculum, an essay, personal achievement or leadership, in-state residency, and, of course, race and ethnicity. "Under-represented minority applicants automatically receive 20 points based upon their membership in one of the identified under-represented [racial or ethnic] categories," *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 (E.D. Mich. 2000), a bonus worth one full grade point of high school average or

[4] This means that, "roughly speaking, under-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average with roughly the same LSAT scores." *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting). It also means that "minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as majority applicants with an A average and an LSAT score over 167 (the 96th percentile nationally)." *Id.* (Boggs, J., dissenting).

more than the total amount of points that can be earned for a perfect standardized test score.[5]

To justify the affirmative action programs, the University asserts an interest in racial and ethnic diversity, with such diversity purportedly being achieved through admissions preferences that strive to assemble a "critical mass" of under-represented minority students. *See* Br. in Opp'n to Pet. for a Writ of Cert. at 1, 3, *Grutter v. Bollinger*, No. 02-241; Br. in Conditional Opp'n to Pet. for a Writ of Cert. Before J. at 2-3, 8-9, *Gratz v. Bollinger*, No. 02-516. Nevertheless, it would be miraculous if it were true that the University's interest could be reached by assigning such hard numbers to factors that appear quite arbitrary.

The University provides no definition of when a minority group is under-represented, over-represented, or even properly represented. Rather, the University sets forth a vague definition of what constitutes a "critical mass," which turns entirely on the hazy judgment of administrators about whether students will be comfortable among their peers.[6] As best as *Amicus* can tell, the University does not conduct any follow-up of its annual admissions to confirm whether a "critical mass" of students from the under-represented minority groups could be admitted without the race- and ethnic-based preferences. Instead, the University uses the preferences regardless.

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[5] Admittedly, at least the University's undergraduate admissions program gives some weight to criteria other than race, but the elevation of race above all other non-suspect factors demonstrates the admissions program's constitutional infirmity.

[6] *See, e.g.*, Proof Br. of Defs.-Appellants at 10-11, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. filed May 24, 2001) ("The Policy does not define 'meaningful numbers' or a 'critical mass' of underrepresented minority students in terms of minimum percentages or numerical targets. ... [T]he concept of critical mass is not susceptible to quantitative definition; instead the existence or absence of critical mass is apparent in the nature and quality of student interactions.") (citations omitted).

If the University is going to be permitted to claim that its interest in racial and ethnic diversity is legitimate, it had better be able to justify it. In the absence of being able to do so, the University's asserted interest is not in any sense constitutionally compelling. *Amicus* respectfully suggests that achieving a diverse student body is not compelling when the University cannot even define its goal with any sort of precision. Moreover, the University itself admits as much by acknowledging that racial and ethnic diversity "is merely one educational objective among many that the admissions process seeks to foster" and that the interest *"is constantly balanced and compromised* in the face of competing admissions objectives." Br. in Opp'n to Pet. for a Writ of Cert. at 6, *Grutter v. Bollinger*, No. 02-241 (emphasis added).

This Court has recognized that when an asserted interest is pursued inconsistently, the constitutional weight accorded that interest must be wholly discounted or, at the very least, reduced. Indeed, this Court explained in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 186-87 (1999), that working at cross purposes undermines any claim that an asserted interest is valid. The University's willingness to "constantly balance and compromise" its asserted interest, therefore, demonstrates that such an interest is *not* constitutionally compelling.

A. The University's Interest in Racial and Ethnic Diversity Frustrates the Fundamental Purpose of Constitutional Equal Protection

This Court has long held that the "central purpose" of constitutional equal protection "is to prevent the States from purposefully discriminating between individuals on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and that classifications "that explicitly distinguish between individuals on racial grounds fall within the core of that

prohibition," *Shaw*, 509 U.S. at 642. Given such a purpose, this Court has repeatedly emphasized "that 'distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,' and that 'racial discriminations are in most circumstances irrelevant and therefore prohibited.'" *Adarand Constructors, Inc.*, 515 U.S. at 214 (quoting *Hirabayashi*, 320 U.S. at 100).

The fundamental purpose of individual equality irrespective of race or ethnicity applies to all persons with the same full force. As Justice Powell wrote: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.). Thus, "consistency" in the force and application of constitutional equal protection "recognize[s] that *any* individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand Constructors, Inc.*, 515 U.S. at 230 (emphasis added).

There is no question that the University's admissions programs give substantial preferences to applicants identified as coming from under-represented minority groups. These preferences, in turn, are used to further the University's asserted interest in admitting and enrolling a racially and ethnically diverse student body. Thus, by furthering an asserted interest in racial and ethnic diversity, the affirmative action admissions programs "simply replicate[ ] the very harm that the Fourteenth Amendment was designed to eliminate." *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Such a system is the epitome of what Justice Powell, in *Bakke*, explained is constitutionally off-limits: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution

forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (citations omitted).

The Fourteenth Amendment "seeks ultimately to render the issue of race *irrelevant* in government decisionmaking." *Hopwood*, 78 F.3d at 940 (emphasis added) (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination.") (footnote omitted)). Nevertheless, the University of Michigan's asserted interest makes the issue of race undeniably *relevant* to admissions decisions into the unforeseeable future. As the Sixth Circuit acknowledged below, the interest asserted by the University "does not have a self-contained stopping point." *Grutter*, 288 F.3d at 752. Thus, sanctioning such an interest as compelling only frustrates the "core purpose" of constitutional equal protection to make race and ethnicity ultimately unimportant and inconsequential to the state.

B. This Court Has Never Recognized and Should Never Recognize Racial and Ethnic Diversity as a Compelling Interest

Both the University of Michigan and the courts below rely on Justice Powell's *Bakke* opinion as support for the notion that achieving a racially and ethnically diverse student body is a compelling interest that passes constitutional muster. *See Grutter*, 288 F.3d at 739; *Gratz*, 122 F. Supp. 2d at 819. However, such support is that of a lone Justice's opinion that has never garnered the assent of a majority of this Court and, as a result, has never achieved precedential value. Moreover, any persuasive authority Justice Powell's *Bakke* opinion may have possessed has long since vanished as this Court has established that there is but one compelling governmental interest to justify racial classifications—remedying specific past wrongs. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality

opinion) (noting that government racial classifications must be "strictly reserved for remedial settings").

Even though Justice Powell observed that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education" in announcing the judgment of this Court in *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.), the University's dependence on this single proposition to justify its odious stereotyping is extremely disingenuous and disregards the complete teaching of Justice Powell's opinion. Moreover, such a narrow reading ignores the fact that all eight other Justices rejected his position. This is best illustrated by the fact that "the word 'diversity' is mentioned nowhere [in the *Bakke* decision] except in Justice Powell's single-Justice opinion." *Hopwood*, 78 F.3d at 944. An analysis of the various opinions produced by the *Bakke* Court also demonstrates the rejection of his position.

The four Justices who would have upheld the affirmative action admissions program at the Medical School of the University of California-Davis believed that such "benign" racial preferences should only be subject to intermediate scrutiny. *See Bakke*, 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Consequently, those four Justices explained that the Medical School's race-based admissions only had to "'serve important governmental objectives'"—a constitutional standard lower than the compelling interest required under strict scrutiny—and implicitly rejected Justice Powell's position that educational diversity rose to the level of a compelling interest. *Id.* (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *see also id.* at 326 n.1 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated

student body is necessitated by the lingering effects of past discrimination.") (citation omitted).

On the other hand, the four remaining Justices declined to even reach the constitutional issue, instead finding that the Medical School's race-based preferences violated Title VI. *See id.* at 412 (Stevens, Stewart, Rehnquist, JJ., and Burger, C.J., concurring in the judgment in part and dissenting in part) (explaining that it was unnecessary to determine "whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment . . . [because] [t]he plain language of the statute . . . requires the affirmance of the judgment below.") As a result, those four Justices also rejected Justice Powell's position by concluding such constitutional analysis was wholly unnecessary.

Likewise, "[i]n the years since *Bakke*, th[is] Court has never returned to whether diversity may be a compelling interest supporting a university's consideration of race in making admissions decisions." *Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001). Specifically, "[n]o case [decided by this Court] since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis." *Hopwood*, 78 F.3d at 944.

Indeed, recent decisions from this Court indicate that an asserted interest in racial or ethnic diversity is *not* a compelling governmental interest and fails to pass constitutional muster under strict scrutiny. As stated by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, in a dissent that was later vindicated by this Court's decision in *Adarand Constructors*: "Modern equal protection has recognized only one [compelling] interest: remedying the effects of racial discrimination. The interest in . . . diversity . . . is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Metro Broad., Inc. v. FCC*,

497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); *accord J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion) ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). Thus, in the end, this Court should continue in its narrow view of what constitutes a compelling interest and should not recognize diversity as compelling.

C. The Interest in Educational Diversity Outlined by Justice Powell in *Bakke* Encompasses Far More Than Just Race and Ethnicity

Even if this Court concludes that the interest in educational diversity articulated by Justice Powell in his *Bakke* opinion is sufficiently compelling to satisfy strict scrutiny, the interest asserted by the University of Michigan is wholly inadequate. Justice Powell's interest in the "attainment of a diverse student body" and "[a]cademic freedom" is founded on the notion that institutions of higher education "must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas.'" *Bakke*, 438 U.S. at 311, 312, 313 (opinion of Powell, J.). Nevertheless, the University's admissions programs give short shrift to ideas in exchange for an impermissible reliance on race and ethnicity to near exclusivity.

Justice Powell explained that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Id.* at 315 (opinion of Powell, J.). His opinion embraced preferences based upon whether "[a]n otherwise qualified . . . student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a[n] [institution of higher learning] experiences, outlooks, and

ideas that enrich the training of its student body and better equip its graduates." *Id.* at 314 (opinion of Powell, J.). Thus, it is not surprising that Justice Powell explicitly rejected the race-based admissions program used by the Medical School of the University of California-Davis because, in his words, an "admissions program, focused . . . on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* at 315 (opinion of Powell, J.).

This Court need only look as far as the admissions figures and policies themselves to see that the University of Michigan's interest in diversity is only as deep as the color of an applicant's skin. The University gives substantial preferences to applicants who come from races and ethnicities deemed under-represented while other factors are valued only slightly, if at all. *See Grutter*, 288 F.3d at 796-800 (Boggs, J., dissenting); *Gratz*, 122 F. Supp. 2d at 826-28. This is precisely what the interest in educational diversity set forth by Justice Powell sought to avoid. Race and ethnicity cannot be used as proxies for other valued distinctions, such as varied viewpoints, experiences, and economic factors, which help to create a truly educationally diverse student body. This is because "[t]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12 (1974). Therefore, inasmuch as a diversity of views may be valuable, a reliance on racial and ethnic diversity cannot be the means for achieving the ends.

II. THE RACE- AND ETHNIC-BASED ADMISSIONS PROGRAMS ARE NOT NARROWLY TAILORED

The University's admissions programs also fail to satisfy strict scrutiny because they are not narrowly tailored. The preferences given to applicants from under-represented minority groups are of such a large magnitude that the admissions programs are functionally no different than the race-based two-track admissions system found impermissible by this Court in *Bakke*, 438 U.S. at 315-20 (opinion of Powell. J.). Moreover, since the goal of the policies is to ensure that the favored races and ethnicities represent a "critical mass" in the student body, the preferences both operate and were designed to operate as unlawful and unconstitutional racial quotas. *See id.* In the alternative, even if the goal of a "critical mass" does not establish a quota, then that undefined and amorphous target makes narrow tailoring impossible and leaves too much room for constitutional error.

A. The Size of the Racial and Ethnic Preferences Imposes Two Different Admissions Standards

Even under this Court's decision in *Bakke*, surely the size of the preference—or "plus"—matters. After all, as Justice Powell explained, if some applicants, "[n]o matter how strong their qualifications, . . . are never afforded the chance to compete with applicants from the preferred [racial and ethnic] groups for [some] admissions seats," then the admissions program exposes its facial intent to discriminate because it creates an impermissible racial quota. *Id.* at 319 (opinion of Powell, J.). Thus, the size of the preference cannot be so large that applicants from favored races and ethnicities are essentially being admitted under a wholly separate standard. Instead, a permissible preference may only "tip the balance" in an applicant's favor. *Id.* at 316 (opinion of Powell, J.). The University's racial and ethnic

preferences clearly exceed these limits, and are "just too large to be narrowly tailored." *Grutter*, 288 F.3d at 796 (Boggs, J., dissenting).

The admissions programs create what are, in essence, two different standards for admission—one for applicants from the under-represented minority groups and another for all other applicants. The unfairness of such a system was pointed out by a hypothetical set forth by the dissent in the Sixth Circuit below:

> If confronted a year before they applied to the Law School with the records of two students, whose non-racial credentials were equivalent, [the University of Michigan] might evaluate their prospects for admission as follows: Student A could work harder and raise her GPA by a full point. Student B could reveal the fact of his skin color or ethnicity, it being in one of the preferred categories. The Law School's admissions officer, who before both changes would have rated the students equally, would now find the students equal, the effort of the one being counterbalanced by the [racial or ethnic] background of the other.

Grutter, 288 F.3d at 797 (Boggs, J., dissenting) (footnote omitted); *see also supra* at 5-6 (explaining that race is worth one full grade point of average and a double digit increase in standardized test score and percentile). But, as this Court established in *Bakke*, not only is such a two-track admissions program unfair, it is also both legally and constitutionally invalid because it is not narrowly tailored. *See Bakke*, 438 U.S. at 315-20 (opinion of Powell, J.).

B. The Goal of Admitting a "Critical Mass" of Under-Represented Minority Students Is Nothing More Than a Racial Quota

The size of the racial and ethnic preferences is not the only narrow tailoring concern raised by the University's admissions programs. The goal to admit a "critical mass" of under-represented minority students raises the specter that the admissions programs practically set aside seats for the favored races and ethnicities by functionally creating constitutionally impermissible quotas.

The *Bakke* decision held that university admissions programs "in which a . . . percentage of the student body is in effect [reserved for] members of selected ethnic groups" are not narrowly tailored because such quotas evince a "facial intent to discriminate" on the constitutionally protected bases of race and national origin. *Id.* at 315, 318 (opinion of Powell, J.). Thus, university affirmative action programs may not set aside "a fixed number of places" in the student body for under-represented minority students. *Id.* at 316 (opinion of Powell, J.). Instead, constitutional equal protection requires that each and every applicant is "afforded the chance to compete . . . for every seat in the class." *Id.* at 319-20 (opinion of Powell, J.).

Although the University of Michigan insists that it does not set aside or reserve a certain number of seats or percentage of its student body for certain races or ethnicities, it does "concede[ ] that the [racial and ethnic] preference[s] [are] *designed* to admit a 'critical mass' of under-represented minority students." *Grutter*, 288 F.3d at 800 (Boggs, J., dissenting) (emphasis added). Such a goal is nothing more than the functional equivalent of a constitutionally forbidden racial quota. After all, a "critical mass" is just the University's coded way of saying there is some threshold number of minority students it seeks to admit.

Specifically, the University itself admits that a "critical mass" is the "number sufficient to enable under-represented minority students to contribute to classroom dialogue without feeling isolated" or, put another way, the number necessary "to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences." *Id.* at 737. Thus, the University's goal of admitting and enrolling a "critical mass" of students from under-represented races and ethnicities, at the very least, establishes some numerical floor or minimum number. Given such a minimum below which the University will not go, the "admissions scheme is functionally, and even nominally, indistinguishable from a [constitutionally impermissible] quota system" because, like the Medical School's admissions scheme in *Bakke*, the University's admissions programs seek to ensure that some minimum number of racially- and ethnically- preferred applicants are admitted. *Id.* at 802-03 (Boggs, J., dissenting). As such, the University's use of racial and ethnic preferences to achieve a "critical mass" of certain under-represented minority students is not narrowly tailored and fails strict scrutiny under the Equal Protection Clause.

C. The Indeterminacy of Diversity Makes Narrow Tailoring Impossible

Even if the University's goal of admitting a "critical mass" of under-represented minority students does not constitute an impermissible racial quota, the University's admissions programs still eviscerate the narrow tailoring requirement because the University has failed to identify what the "right" amount of representation for the preferred races and ethnicities should be. The absence of any clear idea of what constitutes a "critical mass" means that the University is completely unable to determine whether it has

reached its goal of admitting students from the underrepresented races and ethnicities, or even gone beyond it. Thus, neither the University nor a reviewing court could possibly narrowly tailor the preferences to the asserted interest in "diversity" because that interest is too amorphous and undefined.

While there is admittedly an abundance of lip service paid to the University's desire for a "critical mass" of supposedly under-represented minority students, that goal is wholly subject to University discretion and, therefore, represents nothing more than individual predilection. Such an interest raises the constitutional concern that it is literally impossible to narrowly tailor a means to an undefined and constantly changing end. After all, if the University's goal is but an indefinite judgment made by the University and its administrators, then no court could ever determine when or if the University had transgressed the boundary between narrowly serving its interest and *over* serving that interest to the detriment of constitutional equal protection.

Moreover, the proposed interest in racial and ethnic diversity—no doubt well-intentioned—confuses values and facts. An admissions scheme that is not supported by empirical facts but rather philosophical values also makes judicial review either impossible or wholly an *ad hoc* proposition. Indeed, it is exceedingly difficult to imagine how any court could judge the worth of the University's interest in the absence of something more than its bare value-laden assertions to seek racial and ethnic diversity. Accordingly, this Court should not take on faith that the University's amorphous computations will yield constitutionally sound results for all races and ethnicities.

CONCLUSION

For the foregoing reasons, the decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan should be reversed.

Respectfully submitted,

RENEE L. GIACHINO
Counsel of Record
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street,
Suite 402
Alexandria, VA 22314
(703) 535-5836

Counsel for Amicus Curiae

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